No. 10849.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

AMELIA E. COLLINS,

Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES.

BRIEF FOR THE RESPONDENT.

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Statement of the Case.

This case involves the deductibility of interest paid by respondent individually in the taxable year 1939 on a deficiency in estate tax determined against the estate of respondent's deceased husband. Respondent was executrix and sole legatee and the *entire* amount of interest involved accrued *after* the estate had been distributed to respondent. (Respondent will hereinafter be referred to as taxpayer.)

The Tax Court in a memorandum decision [R. 8-12] upheld the taxpayer's right to the deduction claimed.

The Commissioner's brief, pp. 2-6, correctly summarizes the principal facts.

Statutes Involved.

1. Section 23(b), Internal Revenue Code:

Sec. 23. *Deductions from Gross Income*—

In computing net income there shall be allowed as deductions:

* * * * * * * *

(b) *Interest.*—All interest paid or accrued within the taxable year on indebtedness, * * *

2. Section 827(a), Internal Revenue Code (identical with corresponding Section 315(a), Revenue Act of 1926, as amended by Section 613(b), Revenue Act of 1928, and Section 809, Revenue Act of 1932):

Sec. 827. *Lien for Tax.*

(a) *Upon Gross Estate.*—Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any or all property of such estate from the lien herein imposed

3. Section 900(a), Internal Revenue Code:

Sec. 900. *Transferred Assets.*

(a) *Method of Collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions

and limitations as in the case of a deficiency in a tax imposed by this subchapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) *Transferees.*—The liability, at law or in equity, of a transferee of property of a decedent, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed by this subchapter.

(2) Fiduciaries.—The liability of a fiduciary under section 3467 of the Revised Statutes (U. S. C., Title 31, §192) in respect of the payment of any such tax from the estate of the decedent.

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

4. Revised Statutes, Section 3467:

Sec. 3467. Revised Statutes (as amended by Section 518(a) of the Revenue Act of 1934 [U. S. C., 1934 edition, Title 31, Section 192]). Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

Summary of Argument.

A statement of four points on which taxpayer relies will indicate the direction her argument will take. The right to the deduction claimed is sustained by and flows from the following propositions:

I. Taxpayer alone had the benefit of the debt to the United States upon which the interest accrued.

II. The estate tax debt to the United States was taxpayer's personal obligation, because of her act in *distributing* the estate (R. S. 3467, 31 U. S. C. A., Section 192).

III. The estate tax debt to the United States, being paid to discharge the estate tax lien on property which taxpayer *received* from the estate, was taxpayer's debt within the meaning of the revenue laws.

IV. As a transferee, taxpayer stepped into the shoes of the estate, the transferor.

The Court has not previously passed upon the arguments herein advanced. The questions here presented were involved and could have been, but were not, presented (or at least were not effectively presented) in *Commissioner v. Green*, 148 F. (2d) 157. We shall contend that the *Green* case is not an authority because

(a) The taxpayer was not represented, except nominally, by counsel, the brief in that case having been prepared by the layman who represented the taxpayer (and the taxpayer's brother Ralph J. Green) in the Tax Court. [See Appendix.] There was no oral argument for the taxpayer.

(b) The *Lawrence Green* case was, in effect, decided upon the Government's *ex parte* presentation, the controlling authorities and even the controlling statutes not being brought effectively to the Court's attention. The same applies to the *Ralph J. Green* case in the Eighth Circuit, presented and decided under identical conditions.

(c) Irrespective of the foregoing, the *Lawrence Green* case can, we submit with deference, be shown with mathematical certainty to have been wrongly decided. The principle involved being one of great importance, we respectfully suggest that the questions presented should be examined *de novo,* in the light of the applicable statutes and authorities. A further, and we believe urgent reason for re-examination of the problem arises out of the fact that the decision by the Third Circuit on August 31, 1945 of the *Breyer* and *Koppers Co.* cases creates a conflict between that Circuit on the one hand and the Fifth, Eighth and Ninth Circuits on the other, in respect of the transferee issue involved, thus preparing the way for almost certain review of that particular issue by the Supreme Court.

I.

Taxpayer Alone Had the Benefit of the Debt to the United States Upon Which the Interest Accrued.

The Thomas H. Collins estate was fully distributed July 20, 1938, only thirteen months and seventeen days after Thomas H. Collins' death, and nearly a month and a half prior to the date (September 3, 1938) when the estate tax return was due [R. 9], and prior, correspondingly, to the time when interest on the deficiency *commenced* to accrue. Fifteen months later, on October 20, 1939, Mrs. Collins paid $129,500 of a proposed deficiency of $130,-116.66 [R. 10], paying in addition the interest [R. 11], which the Commissioner now contends she had no right to deduct. Under these circumstances it is manifest that the *estate* received no benefit from the somewhat involuntary loan which Mrs. Collins caused the United States to make to her when she, as executrix, failed to pay the entire tax when due. The estate's income was not enhanced by gainful employment of this borrowing. Except in an attenuated and incorporeal form (the executrix not having received formal discharge) the estate had ceased to exist. From September 3, 1938, to October 20, 1939, Mrs. Collins, sole distributee of the estate, had the entire benefit of the moneys withheld. Those moneys were presumably invested by her, yielding income on which she paid taxes to the government. And in addition she paid six per cent interest on the loan. This seems to have been not a bad investment for the government. The language of the Board in *Harvey M. Toy*, 34 B. T. A. 877, 881-2 (again referred to under II, *infra*) is apropos:

> "After the distribution of the property to petitioners, they were the owners of the income therefrom.

> Had they then paid this indebtedness, which included both tax and accrued interest, no further interest would have been due. The interest on that debt thereafter accrued because of the petitioners' delay or withholding of payment of the obligation which constituted a lien on their property."

See also cases cited under III, *infra*, upon the point that the person really and ultimately (though not in form), liable for payment of a debt is entitled to the interest deduction.

Having obtained the use of the funds, it was proper that Mrs. Collins should pay interest. Having paid the interest, and having, presumably, paid taxes on the accretion to her own income arising from the use of the government's money, it seems proper that Mrs. Collins should obtain the claimed deduction. We hesitate to speak of the equities in a tax case, but no court has ever held that a taxpayer need be embarrassed by having justice on his side. We are happy to say that the United States lost no money—it may even have profited—because of the way in which Mrs. Collins handled this transaction.

Since, therefore, the person paid the interest who got the benefit of the loan, her right to deduct the interest should follow as of course unless there is some principle which constitutes a positive bar. Is there such a principle? The Commissioner contends that there is, saying, in effect, that the obligation to pay the tax—and, therefore, the interest—was that of the "estate": that the taxpayer, paying this debt, was discharging an obligation not her own; that she was, in this transaction, a sort of volunteer. This brings us to our second point.

II.

The Estate Tax Debt to the United States Was Taxpayer's Personal Obligation, Because of Her Act in Distributing the Estate.

It is clear enough that interest paid by one person on the obligation of another is not deductible for income tax purposes. *Colston v. Burnet,* 59 F. (2d) 867 (App. D. C.), cert. den. 287 U. S. 640. But there is no simple, unfailing rule by which it can be determined who is the obligor and entitled, therefore, to the interest deduction. That is a matter of the substantive law applicable to the particular case.

The substantive law applicable here determines that Mrs. Collins was the obligor. When she, as executrix, distributed the estate without payment of the tax due the United States, she subjected herself to the liability imposed by a statute almost as old as the Constitution itself, the former Sec. 3467 R. S., now 31 U. S. C. A. Sec. 192, a statute of 1799.

That section, quoted above, provides that any fiduciary, including an executor, who pays debts of the estate before paying debts due the United States, "shall become answerable in his own person and estate for the debts so due to the United States, or so much thereof as may remain due and unpaid." Although this statute speaks of "debts" due by the person or estate for whom the fiduciary acts, it has been construed as making an executor or trustee liable if he *distributes* the estate or trust property without paying claims which are at least known to be due to the United States. *United States v. First Huntington National Bank*, 34 F. Supp. 578 (D. C., W. Va.: estate tax), aff'd on the opinion below, 117 F. (2d) 376

(C. C. A. 4); *Helen Dean Wright,* 28 B. T. A. 543 (1933; estate tax; distributees, heirs at law, also liable): see also *Anderson v. United States,* 15 F. Supp. 216 (Ct. of Cls.), cert. den. 300 U. S. 675; *United States v. Cruickshank,* 48 F. (2d) 352 (D. C., N. Y., 1931); and see Reg. 105, Sec. 81.99, quoted *infra,* p. 13.

In *United States v. Weisburn,* 48 F. Supp. 393 (D. C., Pa. 1943), the widow of a decedent who paid debts of the decedent before she paid income taxes due from him, leaving an amount insufficient to pay those liabilities, was held personally liable for amounts paid on debts of decedent over which the United States had priority. As executrix she was held liable for the amount of estate funds remaining in her hands.

The Board of Tax Appeals applied R. S. 3467 to a situation identical with the present in *Harvey M. Toy,* 34 B. T. A. 877 (1936; non-acq.), holding that when the administrators of an estate distributed to themselves as sole beneficiaries the assets of the estate without paying the federal estate tax and later satisfied the liability, paying interest on it, they could deduct the interest. The decision was rested on the administrators' personal liability under R. S. 3467. Although the holding in that case is impliedly disapproved in this Court's recent decision in *Commissioner v. Green,* 148 F. (2d) 157, we respectfully suggest that the Court may wish now to examine that point, and perhaps to reconsider a conclusion reached without the benefit of argument on behalf of the taxpayer and without having the relevant authorities brought to its attention—a matter presently to be referred to.

Although the point is by no means indispensable to maintaining our position, we believe it to be clear that

by distributing her deceased husband's estate without payment of the tax due the United States, Mrs. Collins incurred a liability which was identical with the original tax liability. She became "answerable" for the *original debt* due the United States, not for a new debt in the nature of a penalty created by the transfer. This seems implicit in *United States v. Motsinger*, 123 F. (2d) 585 (C. C. A. 4)—an action against a trustee to whom assets of the taxpayer had been transferred in trust and who had distributed them without paying taxes assessed against the taxpayer. The question was one of limitations, and the action was held not maintainable because not brought within six years after assessment. Discussing the nature of the fiduciary's liability, the Court says that "the proceeding under 3467 is nothing more than one to collect the tax of the taxpayer out of the fiduciary." Again the Court speaks of "the patent fact that it is in reality *the old tax liability of the original taxpayer* which is being enforced against the fiduciary." (Emphasis ours.) Quoting from the *First Huntington National Bank* case, *supra*, p. 8, the Court says,

> *"While this suit is against the fiduciary personally, it is nevertheless a proceeding in court to collect the identical tax which was previously assessed against the estate."* (Emphasis the court's.)

The court cites *United States v. Updike*, 281 U. S. 489 (1930) to which we shall refer later.

The principle that the person who distributes an estate without paying debts due the United States steps into the debtor's shoes, becoming subject to his burdens and entitled to his incidental benefits, if any, receives additional support from the cases cited under the next heading. They are in fact *a fortiori* authorities sustaining that prin-

ciple, for reasons which will be stated below. But before proceeding to another point, we wish to notice the treatment of the R. S. 3467 contention in the case of *Commissioner v. Lawrence R. Green,* 148 F. (2d) 157 (1945).

Regarding this matter, the Court says in the concluding paragraph of its opinion:

> "We are not impressed by the suggestion, apparently made for the first time in petitioner's brief, that his status, as former executor of his father's estate, changes materially the nature of *his liability*, under the facts of this case. See Sections 3466 and 3467 Revised Statutes, Sections 191 and 192, 31 U. S. C. A. The *father's estate* was solvent. Nothing is shown to indicate that debts of the estate were paid at such times and in such manner as to prejudice or jeopardize the estate tax claims of the Government. The Commissioner asserted a tax deficiency against petitioner, as a transferee of his father's estate, and not otherwise. The case was tried in the Tax Court on that theory. See 3 T. C. 74." (Emphasis the Court's.)

Now the "suggestion" by which the Court was quite properly "not impressed" is contained in the following two sentences quoted from page 24 of Green's brief:

> "Sec. 3467, Revised Statutes, provides that every executor who paid any debt of the estate without paying debts to the United States from the Estate 'shall become answerable in his own person and estate' for the amount of debts due to the United States. As hereinabove pointed out such personal liability is not necessary to make the estate tax deficiency an indebtedness under Sec. 23(b), but if such personal liability is necessary, then the taxpayer in this case had such personal liability."

The excerpt quoted *constitutes the entire argument* which the taxpayer in the *Green* case made, in this Court, or in the Eighth Circuit, on this important and difficult subject.[1] The Attorney General filed a twelve page reply to the "argument" just quoted. In his brief in the instant case, the Attorney General says:

> "The taxpayer argued, in the alternative, before the Tax Court, as did the taxpayer on appeal in the *Green* case, *supra*, that Section 3467 of the Revised Statutes (Appendix, *infra*), imposed a tax liability on her, as executrix, for having paid over the assets of the estate to herself before satisfying the estate tax in full. Accordingly, it was contended that the taxpayer, in paying interest on the deficiency, had paid interest on her own indebtedness which was deductible under Section 23(b)."

We have already pointed out the extent to which the taxpayer in the *Green* case "argued" and "contended" regarding this matter.

The casual treatment of this matter by the certified public accountant who wrote the briefs in the *Green* cases undoubtedly accounts for the fundamental misconception —we say it with deference—which the excerpt above quoted from this Court's opinion in the *Lawrence Green* case shows regarding the purpose and effect of R. S. 3467. That excerpt indicates the Court's belief that R. S. 3467 becomes operative only when the fiduciary pays *debts*, ignoring the claims of the United States. The authorities cited above, p. 8, and the Commissioner's own regulations (see *infra*) conclusively prove the contrary. The Court remarks, *"The father's estate* was solvent" (italics

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[1]The facts regarding this matter are set forth in the Appendix.

the Court's). Original solvency is of no consequence if *by distribution of all assets of the estate without paying debts due the United States it becomes insolvent.* As in the case of a transferee's liability (see *Baumgartner v. Commissioner,* 51 F. (2d) 472 (C. C. A. 9, 1931, cert. den. 284 U. S. 674), everything necessary to fix the fiduciary's liability has transpired when it appears (or is admitted, as in the instant case) that distribution has been made without paying taxes. To hold otherwise would limit the applicability of R. S. 3467 to cases where the estate is insolvent while in the fiduciary's hands, not extending it to cases where the fiduciary's own conduct in making a premature distribution renders it insolvent. That the Attorney General, charged with the duty of protecting the interests of the United States, should sponsor such a theory passes the bounds of credibility. That a court of the United States, advised of the consequences, should uphold it, seems improbable in the extreme.

The *Treasury* does not read into the statute the limitation implied in this Court's opinion in the *Lawrence Green* case. In Reg. 105, Sec. 81.99, it is provided:

> "If the executor, before paying all the estate tax, pays, in whole or in part, any debt due by the decedent or the decedent's estate, *or distributes any portion of the estate*, he is personally liable, to the extent of such payment or distribution, for so much of the estate tax as remains due and unpaid." (Emphasis supplied.)

The emphasized portion of the above quoted regulation first appeared in Article 102, Reg. 80, approved November 7, 1934. In Reg. 70, in effect from 1926 to 1934, the Treasury construed R. S. 3467 as this Court apparently construes it in the *Lawrence Green* case, but that construc-

tion was abandoned by the Treasury eleven years ago. We respectfully ask the Attorney General to inform the Court in his reply whether he is of the opinion (1) that the emphasized portion of the regulation quoted above was inserted erroneously, and (2), whether he thinks a personal representative has the right to *distribute* an estate to devisees and legatees—mere volunteers—without incurring personal liability to the United States for unpaid taxes, while incurring personal liability if he pays *creditors*—persons holding an equity superior to the decedent and those claiming under him.

The Commissioner in the instant case makes no argument based on Sec. 3467, further than to refer (Br. p. 8) to his reply brief in the *Lawrence Green* case, and to say that:

> "While * * * it is the Commissioner's contention that Sections 3466 and 3467 of the Revised Statutes (Appendix, *infra*) do not impose any tax liability on the executor, it is no more necessary to decide this question in its broadest aspects here than it was in the *Green* case, for here, as there, no proceedings were instituted against the taxpayer under Section 3467; the taxpayer did not even purport to pay the deficiency in her capacity as executrix [R. 18]; and there is nothing to show that the estate tax claims of the Government were prejudiced or jeopardized when the taxpayer, as executrix, transferred to herself, as residuary legatee, assets which greatly exceeded the Government's tax claim."

In the brief statement just quoted, the Commissioner makes three patently erroneous assumptions: *First,* that Section 3467 has no application unless the Commissioner institutes proceedings under it. Section 3467 and the

Commissioner's own regulations under it, quoted above, establish the contrary. Mrs. Collins by distributing the estate without payment of the tax became personally liable for it. The Commissioner's acts or omissions can not change the law.

As this Court said in *Baumgartner v. Commissioner*, 51 F. (2d) 472, 473 (1931; cert. den. 284 U. S. 674):

> "* * * The yardstick by which revenue taxes are measured is the United States revenue laws, and not the acts of government officers. * * *"

Second, "that the taxpayer did not even purport to pay the deficiency in her capacity as executrix." Of course not. If she had paid the tax *as executrix* obviously she couldn't claim the interest deduction *as an individual*. She is claiming the deduction in the capacity in which she paid—the only capacity possible, since *as executrix* she had no funds or property when she paid the tax.

Third, that there is nothing to show prejudice or jeopardy to the Government's tax claims when the taxpayer, as executrix, transferred the estate property to herself. The fact that, due to the taxpayer's personal responsibility and honesty, no *actual* prejudice resulted is a fortunate but immaterial circumstance. The statute locks the door before, not after, the horse has been stolen. The Government's rights against Mrs. Collins accrued when she distributed the estate. Their vesting or determination was not stayed until it was ascertained whether Mrs. Collins was going to pay her debt to the United States or squander the assets in riotous living. The Commissioner's contention is contrary to the statute, his own regulations, and the interests of the revenue.

We note in passing that this Court in the *Lawrence Green* case seems to have been misled by a similar sophistry. In the excerpts quoted above, p. 11, the Court after referring to the R. S. 3467 "suggestion" of the taxpayer, says at the end of its opinion, "The Commissioner asserted a tax deficiency against petitioner, as a transferee of his father's estate, and not otherwise. The case was tried in the Tax Court on that theory." We submit that the manner in which the Commisioner asserts deficiencies does not change the law. The *statute* creates liabilities, that is to say, debts. The Commissioner can assert or not assert them as he sees fit. Of course, the taxpayer can *waive* a defense by not urging it. Perhaps that is what the Court meant in its concluding sentence. There was no such waiver here. Respondent has at all times insisted on all her legal rights.

The Commissioner's reply brief in the *Lawrence Green* case discusses, pp. 5-12, Sections 3466 and 3467, R. S., 31 U. S. C. A. 191 and 192. We have no quarrel with most of that discussion. The statement, p. 9, that "no one would contend that if the debt due the United States by the decedent or his estate was on a contract, the executor would by virtue of these sections be substituted for him or it as a party thereto," is plainly wrong if it is intended to say that an executor distributing an estate or depleting an estate by paying claims, without paying a debt due the United States, would not be liable to the latter on a non-tax liability of the decedent to the United States. The Supreme Court cases cited by the Commission prove the contrary. No one, we assume, would contend that "the executor is *substituted* for him or it as a party thereto" (Reply Br. pp. 9-10). The statute says nothing about *substitution*. It says the executor "shall

become answerable." If the Commissioner's perhaps inadvertent use of the word "substituted" is disregarded, and the quoted statement construed as meaning that the executor making the wrongful distribution does not become liable for payment of the original debt, then the statement that there is "nothing in the decisions of the Supreme Court or of those of the lower federal courts which justifies a contrary conclusion," is *first*, erroneous, as we have shown in discussing R. S. 3467; and *second*, even if a correct, it would be an immaterial conclusion. It is sufficient that the executor becomes a debtor to the United States, by whatever route. What difference does it make whether it was the original debt the executrix became liable for, or another debt just like it? This argument belongs in the category of quibble, hardly rising, we submit, even to the dignity of "elusive and subtle casuistries," toward which the Supreme Court has rightly manifested such impatience (*Helvering v. Hallock*, 309 U. S. 106, 118).

Section 3466 was intended to give the United States priority against insolvent estates. Section 3467 put teeth in 3466 by making fiduciaries paying debts due by the persons or estates they act for personally liable for the latters' debts to the United States. In accordance with obvious intent, and in order to close the door to facile evasion, the courts and the Commissioner himself have construed the provisions of 3467 as being applicable to executors who render estates insolvent by distributing to heirs or legatees, as well as to those who merely pay debts. No sophistry can evade the fact that a person who is "answerable in his own person and estate" for a debt is a debtor. He owes an "indebtedness." No exor-

cism, no administrative or judicial magic, can expunge the provisions of Section 23(b) I. R. C., allowing deduction of interest paid on "indebtedness."

The substance of the Attorney General's argument on 3467 is comprehended within the paragraph on page 7 of his reply brief in the *Green* case, where he says that while Section 3466 was designed to give the United States priority in the payment of debts where the property of an insolvent debtor is in the hands of an assignee or other fiduciary, Section 3467 was designed to impose personal liability upon the fiduciary, to insure the Government's priority in the event he disposed of the debtor's property without having first discharged the debt.

We agree. But what of it? Undoubtedly 3466 and 3467 were alike intended to render more certain the collection of debts owing to the Government. There is nothing in either of these sections or in the two considered together to give rise to any inference that a fiduciary who is compelled to pay debts due the United States because he has distributed property without paying them, is not, in making such payments, discharging an "indebtedness." The statute, in saying that the fiduciary "shall become answerable in his own person and estate," *says it is a debt, and that it is his debt.* The Supreme Court's statement in various cases cited by the Attorney General that the assets of the debtor are considered as a trust fund, means that the fiduciary is under an obligation to dispose of them for the benefit of the United States, the primary beneficiary of the "trust." If he violates that duty, the statute makes him personally liable: he becomes himself a debtor of the United States. His violation of a species of trust makes him no less a debtor, nor does the fact that he may have distributed the assets to himself. These are aggra-

vating circumstances, if anything. We repeat that whether the debt which the fiduciary is obligated to pay is the debt of the estate or some new debt which by the very fact of distribution he brings into existence, is beside the point. Whatever its origin, *the debt is his under the very terms of the statute.* And if he pays interest upon it, he is paying interest on his own indebtedness. The language of the Third Circuit in the recent *Breyer* and *Koppers Co.* cases, ... F. (2d) ......, 1945 Prentice-Hall Federal Tax Service, Par. 72,657, 45-2 USTC Par. 9398 (Aug. 31, 1945) used with reference to a transferee's liability is also apropos here:

> "* * * the Tax Court found no difficulty—nor do we—in concluding that the interest paid by the transferees was interest upon their own indebtedness, and this without regard to whether their obligation was a primary or secondary obligation. See *Scripps v. Commissioner,* 96 Fed. (2d) 492 (C. C. A. 6)."

What does it matter whether when he pays tax and interest he is paying *qua* tax or not? The cases cited by the Attorney General show that the applicability of these statutes is not limited to taxes. Although the Attorney General (Reply Brief, *Green* case, p. 9), seems to say the contrary, they apply to all debts due the United States. Fiduciaries making distribution without paying debts due the United States become liable for—they assume—those debts. Stepping into the debtor's shoes, they bear the debtor's burdens and are entitled to such incidental privileges as he may have had.

The Commissioner (Reply Brief, *Lawrence Green* case, p. 11) says:

> "So far we have sought to show that Section 3467 imposes no more than a liability in equity under the trust fund doctrine, or at law for money had and received, from which it necessarily follows that such liability is merely measured by the tax and interest owing by the decedent or his estate. So that whatever may be collected from the fiduciary by way of interest is collected as a part of such liability and not *qua* interest."

The statement that "Section 3467 imposes no more than a liability in equity under the trust fund doctrine," is, we submit, erroneous. The statute, in order to discourage or prohibit conduct injurious to the revenue—payment of debts or a distribution which leaves the estate insolvent—makes the fiduciary "answerable." No doubt there is a "ceiling" on his liability, namely, the amount wrongfully paid out or distributed, plus future interest. That obviously measures the extent of the wrong to the United States. Any exaction above that amount would be purely penal.

Note that in 3467 cases the fiduciary is not being asked to "disgorge" anything. He is liable because he distributes, not because he receives. The Government is not following a trust fund, as it may be said to do in transferee cases. Even in the latter class of cases, the so-called trust fund theory introduces only an element of confusion, diverting attention from the real point at issue, as the quotation, p. 38, *infra*, from the Third Circuit's opinion in the *Breyer* and *Koppers Co.* cases shows. In 3467 cases, the fiduciary is liable for principal and interest, though he receives nothing. Trustees are ordinarily accountable only

for what they receive. As to the *estate,* yes, the executor is a fiduciary, in a sense a trustee, for the United States and all other creditors. The statute, to insure his fidelity as far as the United States is concerned, *makes him personally liable.* That is the extent of the "trusteeship" (*Bramwell v. United States Fidelity & Guaranty Co.,* 269 U. S. 483). Trusteeship is the origin, the occasion, of the liability, but the latter is personal, not fiduciary.

Nor is it correct to say that the liability is "at law for money had and received." (Reply Brief, *Green* case, p. 11.) Section 3467 applies although the fiduciary himself receives nothing. A fiduciary accountable for only $1,000 received by the estate from the decedent and paying it out without satisfying the claims of the United States would be liable for $1,000 *and interest thereon.* Is the Attorney General willing to sponsor the opposing theory? If he is, we invite him to explain how that position can be made to conform with the needs of the revenue or the provisions of the statute creating personal liability.

We have deemed it unnecessary to make the digression necessary to comment further on the authorities cited in the Commissioner's reply brief on R. S. 3467 in the *Lawrence Green* case. It is sufficient to note that none of them supports the Commissioner's present position, and at least one case, *Phillips v. Commissioner,* 283 U. S. 589 (1931), is definitely against him, both on this and the transferee issue. Aside from such comfort as the Commissioner may derive from this Court's decision in the *Lawrence Green* case, 148 F. (2d) 157, or from the *Hunt Henderson* case, 147 F. (2d) 619, he will search in vain for a decision holding that a person "answerable in his own person and estate" for a debt is not a debtor.

The *Green* cases, as we have shown, were both decided on the Commissioner's *ex parte* showing. In the *Henderson* case, the court mentions, but does not discuss, Section 3467, going on the erroneous theory that the Commissioner, because he "sought to enforce no statutory substantive rights," abated something from the personal liability which 3467 placed on the executor. We have already pointed out that the statute, not the Commissioner, creates liabilities. As we shall show later, we believe the Fifth Circuit was plainly in error on the transferee issue. But the decision, having given no consideration to the R. S. 3467 issue, is a feeble luminary on that point.

III.

The Estate Tax Debt to the United States Was Taxpayer's Personal Obligation Because of Her Act in Receiving the Estate.

Under II we discussed the effect of the fact that Mrs. Collins as executrix *distributed* the estate. Here we shall consider the effect of the additional fact that she also *received* it. In receiving the estate she was obviously a transferee. We shall therefore discuss taxpayer's rights and liabilities flowing from her transferee status.

Under certain recent decisions, a problem which should be simple has become so encumbered with legalistic considerations that it appears difficult. Under Section 827 (b), I. R. C., as amended in 1942, if the estate tax is not paid when due, "then the spouse, *transferee,* surviving tenant, * * * to the extent of the value of such property, *shall be personally liable* for such tax." When this case (and the *Green* cases) arose, statutory provisions for personal liability applied only in the case of certain *inter*

vivos transfers (see Section 827, I. R. C. as originally enacted). Under Section 827(a) (quoted p. 2, *supra*), the property distributed to the taxpayer from her husband's estate was subject to the estate tax lien. Therefore, in paying the tax, she was discharging a lien on her own property, and even though she had not been personally liable for the tax, she was entitled to the deduction under a principle recognized in the Commissioner's own regulations. (Reg. 111, Sec. 29.23 (b)-1, identical in this respect with Reg. 101, Art. 23 (b)-1, in effect in 1939, quoted *infra*, p. 28.)

Not only was taxpayer's property subject to the estate tax lien. Under principles well settled long before the amendment to Section 827 (b), I. R. C. (see *Neustadter v. United States*, 90 F. (2d) 34, C. C. A. 9, and other authorities cited under this heading, and in Note 3, *infra*), she was personally liable for the tax. It was her "indebtedness." The tax is a "debt" (*Price v. United States*, 269 U. S. 492, 499). A person personally liable for a "debt" owes an "indebtedness." Since Section 23 (b) allows as a deduction all interest paid on "indebtedness," the interest here in question is deductible by express provision of the statute, subject to the further qualification, immaterial here, that the transferee is personally liable only to the extent of (that is, the indebtedness—principal—cannot exceed) the value of the property received. In this case the property which Mrs. Collins received from the estate was found by the Tax Court to be "substantially in excess" of the tax liability [R. 12]. The distributions totaled $1,417,790.84. The tax as finally determined was $199,400.97 [R. 9-10].

It should be possible to rest the case here.[2] But certain recent decisions, including the *Lawrence Green* case decided by this Court, render it necessary to pursue the subject further.

The following principle runs through and is consistent with all the cases upon deductibility of interest, namely, that where by law or contract a liability for an obligation is imposed upon or assumed by a person, interest paid by that person is deductible. It is unimportant that the liability is shared by another, if payment of the interest is made pursuant to a legal liability. (*George A. Neracher*, 32 B. T. A. 236 (1935; joint and several note; acq.); *Laurence B. Halleran*, C. C. H. Dec. 12,813-B (Aug. 10,

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[2]An experienced commentator on tax subjects says of *Commissioner v. Lawrence R. Green:*

> "Where a person pays interest on the indebtedness of another as a volunteer, he is not allowed a deduction for the interest so paid for the reason that he is not paying interest on his own indebtedness. However, that wasn't the situation here. The taxpayer had a definite liability for both the deficiency and the interest accrued thereon, consequently was in the same position as the principal debtor. The principal debtor was the estate, and, under I. T. 1317, C. B. 1-1, an estate in process of administration is entitled to deduct from the gross income of the estate the interest paid on the estate tax. Since the transferee here stepped into the shoes of the principal debtor and since the Estate itself, the transferor, would have been allowed a deduction for interest paid, it is unfair, unjust and most unconscionable to disallow a deduction to the transferee for interest paid by him." (Par. 4083, Alexander Tax News Letter, March 24, 1945.)

The following, also from an experienced and impartial source, is further illustrative of the reaction of the tax bar to the Green decisions. The following comments relate to *Commissioner v. Ralph J. Green* but they are equally applicable to the *Lawrence Green* case:

> "Seemingly, the opinion of the Eighth Circuit is confined in its inquiry, and totally disregards the legislative history of the transferee section of the Code, upon which the decision of the

1942; joint and several note; appealed, C. C. A. 2); G. C. M. 15,530. XIV-2 C. B. 107 (1935).) So, in the present case, it is immaterial that a continuing liability for payment of the tax may have rested upon the executrix, *as such*, or upon the *estate*, if such an entity could be said to exist after the distributions were made.

In fact, the cases, going further in allowing interest deductions than it is necessary to go in order to uphold the taxpayer's contention here, have allowed deductions to taxpayers who had no *liability* at all to pay interest on a tax deficiency but were indirectly or derivatively charged with it under local law or the terms of particular trusts.

Tax Court so convincingly predicated its conclusions. None of these cases reviewed ever pointed out the Commissioner's regulations on interest deductions, which are analogously pertinent. In Sec. 29.23 (b)-1 of Regulations 111 it is found:

" 'Interest paid by the taxpayer on a mortgage upon real estate of which he is the legal or equitable owner, even though the taxpayer is not directly liable upon the bond or mortgage secured by such mortgage, may be deducted as interest on his indebtedness.'

"It is apparent in such an instance, although the taxpayer has not assumed the payment of the note or bond secured by the mortgage, he has assumed the ownership of the property and if he does not pay the interest or the installments on the principal, the property will be directly subject to attack, distraint, or foreclosure, and he will lose his interest therein. Is the situation any different where an heir takes distribution of an estate's assets which become subject to an estate tax lien and accrued interest? To protect his distribution, although the taxpayer is not originally and directly liable for the taxes and interest, nevertheless he pays the same to protect the assets in his hands. To the point of time of distribution of the assets the debt is that of the estate, but after distribution it is the debt of the taxpayer so far as the accrued interest thereafter on the debt is concerned, because then such accrued interest is the taxpayer's debt if he wishes to hold and protect the property he has received as an heir." (Rewrite Bulletin, Par. 8355, 454 C. C. H. Standard Federal Tax Reports, Feb. 14, 1945.)

In *Penrose v. United States,* 18 F. Supp. 413 (D. C., Pa.) it was held that interest on an estate tax deficiency paid, pursuant to local law, out of trust income, is deductible in computing the net distributive share of a beneficiary of the trust.

In *Scripps v. Commissioner,* 96 F. (2d) 492 (C. C. A. 6, cert. den. 305 U. S. 625) it was held that where the trustee of an *inter vivos* trust was directed under the terms of the trust to pay federal estate taxes from income or principal of the fund, interest on estate taxes was an allowable deduction. The court says:

> "But we have no difficulty in concluding that the interest paid by the trust was interest upon its indebtedness, and this without regard to whether its obligation was a primary or a secondary obligation. The liability was specifically imposed upon it by the taxing law, and its property was subject to government lien. [Sec. 315 (a), (b).] Had it borrowed the money with which to pay the tax there would then have been no question of its right to deduct interest on the indebtedness. We see no question of that right in the present situation."

A case involving an indirect liability for interest is *Sterling Morton,* 38 B. T. A. 1270 (1938), aff'd on another point in 112 F. (2d) 320 (C. C. A. 7). It was held that where the taxpayer was a member of a syndicate formed for the purpose of financing a corporation, and the syndicate by its manager borrowed money and executed a note, the taxpayer paying his *pro rata* share of the interest on the note to the corporation, which in turn paid it over to the payee, was entitled to a deduction for such interest. The Board, page 1273, refers to the fact that under the law of Illinois each member of the syndi-

cate was liable on the note as a primary obligation, and that it was enforceable against the members.

In *United States Fidelity and Guaranty Co.*, 40 B. T. A. 1010 (1939; acq.), it was held that a loan made by the R. F. C. to the taxpayer's subsidiary but actually for the taxpayer's benefit, justified deduction of interest payments to the R. F. C. as interest paid on the taxpayer's obligation. The subsidiary's position was held to be that of an accommodation maker, and the taxpayer the real debtor, having received the funds borrowed. "The obligation * * * was the equitable liability of the accommodated party, in this case the petitioner." (P. 1018.)

In *The New McDermott, Inc.*, 44 B. T. A. 1035 (1941), the Board said (p. 1040):

> "Petitioner received the apartment property from the General Investment Co. by warranty deed, subject to the mortgage in favor of the bank as trustee for the bondholders. Petitioner did not assume the mortgage until after the taxable year. We are nevertheless of the opinion that the indebtedness was that of petitioner within the meaning of the authorities which require the debt to be that of the taxpayer in order to support an interest deduction. *Cf. Joell Co.*, 41 B. T. A. 825. The mortgage indebtedness is a lien on the property of which petitioner is the legal owner and upon which petitioner must necessarily rely for its source of income. Petitioner's whole reason for being would be negatived if the mortgage were foreclosed and the property sold to satisfy the mortgage. Interest accrued on the mortgage is interest on petitioner's indebtedness in spite of the fact that petitioner was not primarily liable on the mortgage."

A principle broad enough to cover the present case is recognized by the Commissioner in his regulations. In Reg. 101, Art. 23(b)-1 (1938), now Reg. 111, Sec. 29.23 (b)-1, it is provided:

> "Interest paid or accrued within the year on indebtedness may be deducted from gross income * * *
>
> "Interest paid by the taxpayer on a mortgage upon real estate of which he is the legal or equitable owner, even though the taxpayer is not directly liable upon the bond or note secured by such mortgage, may be deducted as interest on his indebtedness. * * *"

Applying this principle to the present case. Mrs. Collins was the "owner" of the property distributed from her husband's estate. It was subject to the lien created by Section 827 (a), I. R. C. The incongruity of attaching to a lien created by private agreement greater consequences than are accorded to an Act of Congress, is commented on below.

From the above, it appears that interest may be deductible by a taxpayer (1) whose liability is indirect (*Sterling Morton*); (2) whose liability is only equitable (*United States Fidelity & Guaranty Co.*); (3) who has no liability whatever, but suffers a deduction of the interest under local law (*Penrose*), or the terms of a private trust (*Scripps*); whose property is subject to a lien not assumed by the taxpayer (*New McDermott, Inc.;* Reg. 111, Sec. 29.23(b)-1). Coming closer to the immediate problem, interest is deductible when paid upon an obligation (federal estate tax), which, as here, *constitutes a lien* against property in the hands of the taxpayer. (See

quotation, p. 26, above, from *Scripps v. Commissioner.*) On this point, the Board in the *Toy* case says, 34 B. T. A. at page 882:

"Under these conditions, the situation is not different from that where one receives property, *assuming the payment* of a mortgage thereon. The property is burdened with an obligation to pay the mortgage debt and, as long as such recipient withholds satisfaction of this debt, he must pay the interest specified. We know of no case, in computing net income, where the owner's right to deduct interest paid by him on a mortgage encumbering his property, which accrued since he became the owner, has been questioned. Manifestly, he has that right. The interest paid is a fixed and stated sum, payment of which is required for the withholding of the payment of the indebtedness. The owner has an equity in the property represented by its value in excess of the mortgage, but he is holding and using the entire value. See *Brons Hotels, Inc.*, 34 B. T. A. 376. The fixed amount the owner pays as interest to the mortgagee is interest for the retention, use and enjoyment of that portion of the total value represented by the mortgage debt. *Old Colony Railroad Co. v. Commissioner,* 284 U. S. 552, *Fall River Electric Light Co.*, 23 B. T. A. 168. That situation seems indistinguishable from the one presented here except that there the obligation to pay the mortgage and interest is specifically assumed, *while here the same character of obligation is fixed by law.* Here, as in the instance where a mortgage is specifically assumed the obligation of the petitioners is a personal obligation under section 3467 of the Revised Statutes, *supra.*" (Emphasis supplied.)

Is it conceivable that an "obligation fixed by *law*"—and by federal law—is *less* of an obligation as far as the taxpayer is concerned—and therefore more unfavorably situated in respect of the deductibility of interest upon it—than an obligation privately assumed? An affirmative answer to this question, necessary if the Commissioner's position in this case is to be sustained, would carry consequences serious to the Government itself. It would amount to saying that Congress, exercising its power as the supreme law-giver of the land, cannot compel transferees to assume, *and become personally liable for,*[3] liens created by law, while conceding that power—and the consequences flowing from its exercise, as the cases above cited show—to private persons, and to state laws. We think the Commissioner is wrong in so attempting to circumscribe the powers of Congress, whose servant he is. We believe (1) that the lien or liability created by Congress, higher in origin, is at least as high in rank as a lien or liability created by any state law or private contract; (2) that when Congress says a transferee *assumes* a liability, that assumption is at least as binding as any assumption effected under the provisions of any state law or private contract.

The point is that Mrs. Collins in *receiving*—as well as in *distributing*—the Thomas H. Collins estate became liable for the tax. The language of the Supreme Court

[3]On the personal liability, to the extent of the property received, of a distributee of an estate upon which the estate tax has not been paid, see *Sharpe v. Commissioner*, 107 F. (2d) 13 (C. C. A. 3); *Neustadter v. United States*, 90 F. (2d) 34 (C. C. A. 9); *Helen D. Wright*, 28 B. T. A. 543 (1933); *Commercial National Bank* (Story), 36 B. T. A. 239 (1937; acq.); *Edna F. Hays*, 34 B. T. A. 808 (1936; acq.).

in *United States v. Updike*, 281 U. S. 489 (1930), involving a suit against stockholders of a dissolved corporation to collect income taxes due from the latter, is apropos:

> "It seems plain enough, without stopping to cite authority, that the present suit, though not against the corporation but against its transferees to subject assets in their hands to the payment of the tax, is in every real sense a proceeding in court to collect a tax. The tax imposed upon the corporation is the basis of the liability, whether sought to be enforced directly against the corporation or by suit against its transferees. The aim in the one case, as in the other, is to enforce a tax liability; and the effect of the language above quoted from Sec. 280 is to read into that section, and make applicable to the transferee equally with the original taxpayer, the provision of Sec. 278(d) in relation to the period of limitation for the collection of a tax. Indeed, when used to connote payment of a tax, *it puts no undue strain upon the word 'taxpayer' to bring within its meaning that person whose property, being impressed with a trust to that end, is subjected to the burden.* Certainly it would be hard to convince such a person that he had not paid a tax." (Emphasis supplied.)

So in the present case, the property which Mrs. Collins received was "impressed with a trust to that end." She was therefore, the Supreme Court says, a "taxpayer." Conceding as the Commissioner must, that the Thomas H. Collins estate, paying the tax and interest, could have deducted the latter item, it must follow that the distributee, who became the taxpayer in respect of this item, is entitled to deduct it.

In the later transferee case of *Phillips v. Commissioner,* 283 U. S. 589, 594 (1931), the court speaks of a transferee's liability in these terms:

> "Section 280(a)(1) provides the United States with a new remedy for enforcing the existing 'liability at law or in equity.' The quoted words are employed in the statute to describe the kind of liability to which the new remedy is to be applied and to define the extent of such liability. *The obligation to be enforced is the liability for the tax.*" (Emphasis supplied.)

Now a person who owes an "obligation" is a debtor. It matters not how he became a debtor. That a transferee becomes a debtor is wholly to the Government's advantage. If by virtue of his debtor status he occasionally gains an insignificant advantage, that is a necessary consequence of the position in which the Government, for its own protection and interest, has placed him.

In *Moore v. Commissioner,* 146 F. (2d) 824 (C. C. A. 2, 1945), the court says regarding the correlative provision of the Gift Tax Act (now Section 1009, I. R. C.):

> "* * * While a tax lien is imposed by Section 510 a personal liability is also imposed by the same section. The property transferred was not subject to a lien such as a mortgage or a pledge existing at the time of transfer, but the gift was of the whole property upon which a lien was only imposed to the amount of the gift tax which became due thereafter.

The liability is personal and existed irrespective of any lien. * * *"[4]

See also *Neustadter v. United States,* cited Note 3, *supra,* where this Court held transferees to be subject to a personal liability for estate taxes, which survived even the expiration of the federal lien.

On the basis of the authorities to which the Court's attention has been directed, we respectfully submit that the decisions of this Court and of the Eighth Circuit in the *Green* cases are wrong, and are in conflict with *United States v. Updike* and *Phillips v. Commissioner, supra,* particularly when it is remembered that taxpayer took property subject not merely to a *trust* as in the *Updike* case, but to a statutory *lien* (Section 827(a), I. R. C.). The interest was paid to protect taxpayer's property, and this is sufficient, even without the personal liability which Section 827(b) now imposes in express terms, to entitle taxpayer to the deduction (*The New McDermott, Inc.,* p.

[4]It is stated, p. 4 of the Commissioner's reply brief in the *Green* case, that under 3467 the liability of a fiduciary extends to the value of the entire estate (we assume this means, the estate wrongfully distributed, not in excess of the Government's claims), whereas a transferee's liability is limited to the value of the property he has received; also that the defenses may be different, citing the *Moore* case, which held that the transferee of a gift is personally liable for gift tax thereon to the extent of the value of the gift; also that notice of transferee liability is timely if given within one year after the expiration of the three year period of limitation as to the transferor.

The *Moore* case does not aid the Commissioner. Note the Court's statement, quoted above, regarding personal liability, and that this "liability is personal and existed irrespective of any lien." The defenses are different, as the Commissioner says (p. 4), in that the Government has a year longer to pursue the donee than it had against the donor. It is difficult to see how a person subject to a liability for a longer time than another person remains liable for it is *less* of a debtor than the latter.

27, *supra*; see also authorities cited, pp. 24-25 *et seq. supra,* and in particular *Commissioner v. Breyer,* C. C. A. 3, Aug. 31, 1945).

We venture to suggest, with deference, that this Court and the Eighth Circuit were misled in the *Green* cases as a result of the taxpayers' understandable unwillingness to incur expense in presenting them [see letter of September 14, 1944, from W. E. Baird, quoted, Appendix, p. 1]; and that, as a consequence the entire problem ought to be re-examined. We make this suggestion with the better conscience because of the fact that the present case involves too little to make it of financial consequence, either to the taxpayer or to ourselves, and the further fact that the issues here presented are of unusual importance, presenting the possibility, almost the certainty (in view of the *Breyer* and *Koppers Co.* decisions) that they will ultimately go to the Supreme Court for review. The possibility—we would ourselves state it in stronger terms—that the *Green* case will be overruled will have presented itself to the Court, as will the further consideration that the overruling of that decision, if it occurs, should come most appropriately from the court that pronounced it.

The Commissioner in his brief in this case leans heavily on the *Green* cases. We trust we have shown that these cases are broken reeds, which will not sustain him. In his brief in the *Green* case, he made much of the alleged point that the taxpayer did not pay the tax "qua" tax, hence did not pay interest "qua" interest. We think the contention is fallacious and that the authorities cited under this heading and that immediately preceding conclusively disprove it.

But assume she did not pay the tax "qua" tax. Under R. S. 3467 she became answerable in her own person and

estate for the tax. Pretty clearly, that made her a debtor. It is not necessary to reason why or how she became a debtor. The word of Congress should be sufficient to establish both fact and status. Being a debtor, she had the right (23 (b), I. R. C.) to deduct interest on the indebtedness.

Let us consider her as a transferee. Here again, Mrs. Collins was personally liable; she was a debtor. It is unimportant how she got that way. We can start with the status which the law ascribed to her. If she was a debtor, her right to deduct the interest paid on the "indebtedness" follows as of course.

IV.

As a Transferee, Taxpayer Stepped Into the Shoes of the Estate, the Transferor.

We have quoted Section 900(a), I. R. C. (pp. 2 and 3, *supra*). Its income tax counterpart is Section 311(a). This statute relates solely to collection methods, making available against a transferee or fiduciary the same remedies which the Government would have had against the person originally subject to the deficiency.

This statute has to do with procedure only. It does not affect substantive rights. Congress, which presumably knew the meaning of its own language, said regarding Section 900, I. R. C. (Conf. Comm. Rept., 69th Cong., 1st sess., H. Rept. 356, 1939-1 (Part 2) C. B. p. 372, quoted in *Ralph J. Green,* 3 T. C. 74, 80):

> "Under the amendment the liability of the taxpayer for the tax, including all interest and penalties, is fixed as of the time of the transfer of the assets. No further interest subsequently accrues upon such

> liability *as assumed by the transferee* except the interest under section 276 (b) and (c) for failure to pay upon notice and demand after the outlined procedure has been completed *and* interest at 6 per cent a year for reimbursing the Government at the usual rate for loss of the use of the money due it. * * *"
> (Emphasis supplied.)

See also reference to this same Committee Report in *Commissioner v. Breyer,* ...... F. (2d) ...... (C. C. A. 3, Aug. 31, 1945).

Congress plainly intended that interest would go on as before, and that the transferee would have to pay it. The liability is "assumed by the transferee." Can language speak more clearly? To say that such payments are made "qua" something other than interest seems to us fallacious, and a direct negation of the legislative intent. To say that the Government *receives* a payment "qua" interest (as Congress does) but that the taxpayer *pays* it "qua" something else, seems to border on the incoherent.

We refer again to the following, all cited *supra*:

Phillips v. Commissioner, 283 U. S. 589, 594.

See quotation, *supra,* p. 32.

United States v. Updike, 281 U. S. 489 (1930).

In the *Updike* case, the question was whether a suit against the stockholders of a dissolved corporation to recover unpaid taxes of the corporation was a proceeding to collect a tax under Section 278 (d) of the 1926 Act (now 276 (c), I. R. C.). At page 494 of 281 U. S. the court uses the language quoted, page 31, *supra.*

See also *Scripps v. Commissioner,* 96 F. (2d) 492 (C. C. A. 6), cert. den. 305 U. S. 625, where the court, referring to payment of estate taxes and interest by a revocable trust (only secondarily liable for the tax), uses the language quoted *supra,* page 26.

The Third Circuit in the *Breyer* and *Koppers Co.* cases (...... F. (2d) ......, 45-2 USTC Par. 9398, Aug. 31, 1945), has dispelled the fog in which the Commissioner has succeeded in enveloping these issues. Its conclusions are directly opposed to those reached by this Court in the *Lawrence Green* case, with the exception of the R. S. 3467 issue, which is not discussed, perhaps was involved only in a minor way, if at all.[5] The absence of that issue (or the fact that the Court reached a decision in favor of the *Breyers* without reliance upon it), makes the Third Circuit cases *a fortiori* authorities against the Commissioner in the instant case.

In the *Breyer* and *Koppers Co.* cases, the Court concludes:

> "* * * it is intended by the provision of the statute in question, Section 311, that transferees are to be treated the same as any other taxpayers and allowed the deduction for interest paid in the same way as the transferors would be allowed such deduction; * * *."

Discussing this point, the Court calls attention to Section 311(a), I. R. C. (co-ordinate with Section 900 (a)), to the Conference Report on that section, quoted pages 35

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[5]It is not clear to what extent 3467 was involved. In the *Breyer* cases, two of the executors (widow and son of the deceased), were also distributees. The estate seems to have been closed in October, 1939. The interest in question was claimed as deductible for 1938 and 1939.

and 36, *supra* (the liability for the deficiency "as assumed by the transferee"), and holds that "the liability of a transferee, resultant upon a transfer of assets, is an indebtedness on his part to the Government."

Continuing, the Court says:

> "If interest on the deficiency is to be assessed against, and collected from, a transferee in the same manner and subject to the same provisions and limitations as in the case of a deficiency in the tax, then such interest is to be collected subject to the allowance of that interest, as a deduction to the transferee, in the same manner as would be allowed to the transferor. Some cases appear to emphasize that because the liability for payment of a deficiency and interest thereon on the part of a transferor is secondary, it should not, therefore, be considered that he makes such payment on his own indebtedness. We can see no reason for uncertainty as to the right of deduction upon such ground."

Concerning the "trust fund" doctrine, which the Commissioner seems to consider applicable to the instant case, the Third Circuit says:

> "As has been mentioned, the Tax Court held that denial to a transferee of a deduction for interest paid on a deficiency rested upon an attenuated and unjustified application of the trust fund doctrine. With this conclusion we agree.
>
> "In some cases, it is said that when the transferee is required to pay a deficiency or interest thereon, he thereby 'disgorges'; that a transferee always holds the assets received in trust for creditors including the Government; that while some authorities hold that the tax procedure with respect to transferees brings into play the doctrine of fraudulent conveyances, nevertheless, the trust fund doctrine seems better to

fit the Congressional intent. These concepts and expressions, savoring of remedies for fraud and deceit, breach of trust, and similar procedures, seem inappropriate when applied to a situation like the one before us. In the first place, they are unnecessary to enable the Government to collect the deficiencies, penalties, and interest, from transferees; and legal fictions and constructive trusts are not usually availed of when rights and liability can be determined by application of a rule of law or statutory provision."

Referring to the fact that the Government has a lien under I. R. C. Sections 827 (estate tax) and 3670-3671 (general), and that "the liability of a transferee for payment of the taxes and interest thereon implies an indebtedness on the part of such transferee to the Government," the Court continues:

> "* * * It can also be persuasively contended that it is as reasonable to consider the liability of transferees or distributees in the light of holders of property subject to a lien for taxes (and also personally liable thereon) as it is to consider them constructive trustees subject to being forced to 'disgorge' for fraudulent conduct or breach of trust; and this seems to have been the conclusion of the members of the Tax Court (then the Board of Tax Appeals) in the case of *The New McDermott Inc. v. Commissioner,* 44 B. T. A. 1035, where a deduction was allowed to a company which paid interest on a mortgage on property which it owned, although it had never assumed the mortgage."

The court further considers applicable the rule announced in *Dobson v. Commissioner,* 320 U. S. 489, according due weight to decisions of the Tax Court on matters coming within its province.

V.

Authorities Relied on by the Commissioner.

We have already referred to the cases of *Commissioner v. Lawrence R. Green,* 148 F. (2d) 157 in this Court, and *Nunan v. Ralph J. Green,* 146 F. (2d) 352, in the Eighth Circuit.

The only other case requiring mention is the recent Fifth Circuit case, *Commissioner v. Estate of Hunt Henderson,* 147 F. (2d) 619 (1945), involving interest on an estate tax deficiency paid by a transferee. Under heading No. II we have commented on that case in so far as R. S. 3467 is concerned. On the other point involved, transferee's liability, we submit, with deference, that the learned Fifth Circuit's opinion is self-demonstrative of the error into which the court was evidently led by the same red herring—Section 900, I. R. C.—which diverted the Eighth and Ninth Circuits from the trail. The court says in the *Henderson* case:

> "Section 316(a)(1) of the Revenue Act of 1926 [Sec. 900, I. R. C.] provides that the liability, at law or in equity, of a transferee of property of a decedent for estate taxes and interest shall be assessed, collected, and paid, in the same manner as a deficiency. The Tax Court apparently construed this statute to create a personal liability against the transferee, and on that ground decided in favor of the taxpayers, but the statute does not attempt to declare, define, limit, or alter in any way, the substantive law relating to the liability of a transferee. It simply provides a summary administative remedy for the enforcement of that liability, whatever it may be."

The Tax Court did not construe "this statute to create a personal liability against the transferee." It construed

the statute as leaving substantive liabilities exactly where they were under other statutes (see pp. 79-80 of 3 T. C.). It demonstrated the correctness of that conclusion by quoting from Congressional committee reports. Other provisions of law, hereinabove discussed, *fixed the liability for the debt and the interest upon the transferee.* The *Breyer* and *Koppers Co.* cases constitute, we believe, a sufficient refutation of the Fifth Circuit's opinion.

With deference, but with conviction, we state our firm belief that the *Green* and *Henderson* decisions are erroneous, the former for reasons which the history of the two cases makes plain, and for which the two courts concerned are in no way accountable.

We submit that the Tax Court, bringing to this case the legislative and administrative experience to which the Supreme Court refers in *Dobson v. Commissioner*, 320 U. S. 489, and dealing with "a subject that is highly specialized and so complex as to be the despair of judges" (*id.*, p. 498), has produced a result which takes into account the relevant statutes and is consonant with their requirements. This Court is now afforded the opportunity to align itself with the Third Circuit in reaching a conclusion which we confidently predict the Supreme Court will affirm.

Conclusion.

The Tax Court's decision should be affirmed.

Respectfully submitted,

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October 2, 1945.

APPENDIX.

Recital of certain facts relative to the manner in which the Green cases were presented to this Court and to the Eighth Circuit.

It is regrettably necessary to point out that this Court and the Eighth Circuit were compelled to resolve the important and doubtful issues involved in the Green brothers' cases without the aid of counsel for the taxpayers. Both taxpayers were represented by an attorney acting in a purely nominal capacity, the actual presentation (on brief, there was no oral argument) being made by a layman. This Court's files (in connection with motion made by the Commissioner to stay proceedings in the *Collins* case until the *Green* case was decided, and our various steps taken in opposition thereto) will show these facts, but for the convenience of the Court we shall set forth the following facts disclosed by our letter of November 22, 1944 to the Honorable Curtis D. Wilbur, Senior Circuit Judge, copy of which was sent to the Honorable Samuel O. Clark, Jr., Assistant Attorney General:

The two *Green* cases were handled in the Tax Court of the United States by W. E. Baird, C. P. A., of Kansas City, Missouri. September 14, 1944, Mr. Baird wrote Brady & Nossaman as follows (in part):

> "As I am only a C. P. A., I could not act as counsel before the Circuit Courts. The Green brothers were afraid that the litigation expense might be more than any tax saving. As I was familiar with the matter, I told them I would write draft of brief without much additional expense. It was arranged that they should select counsel to whom I could submit brief, which counsel could correct if he desired and file, and appear as counsel in the case, but I shall probably do most of the work on the brief."

On November 6, 1944, Mr. Baird wrote:

"I am enclosing copy of Brief for *Ralph J. Green* before the Eighth Circuit of the United States Circuit Court of Appeals. I have prepared a similar copy of brief and sent it to an attorney who is going to appear for Lawrence R. Green before the Ninth Circuit. I have received word from him that he has made small minor changes and is having the brief printed, but I do not have a copy of it as yet. * * *"

On November 13th, he wrote:

"* * * I shall write Mr. Cranston that you desire copy of brief.

"In the meantime, I am enclosing copy of suggested paragraph which I sent to Mr. Cranston to be included between points VI and VII of Ralph J. Green brief. I do not know how much cutting or elaborating Mr. Cranston did with respect to that point before sending it to the printer."

The "suggested paragraph" (except for "It is contended herein that" in place of "As hereinabove pointed out") is the paragraph quoted above, page 11, from page 24 of Green's brief.

On November 16, 1944, Mr. Cranston wrote:

"* * * We are enclosing a copy of our Respondent's Brief which has just been printed. You will note that it is substantially the same as the Brief filed in the appeal involving the tax upon Ralph J. Green."

With our letter of November 22, 1944, we sent to Judge Wilbur, a copy of the *Ralph* Green brief in the Eighth Circuit, on which the name of A. Z. Patterson appears

as counsel for the taxpayer. The Court will observe that the briefs in the two Circuits are identical in substance, and are identical in form, except for what Mr. Baird refers to as "small minor changes." These affect phraseology only. For example, the attorneys in the Ninth Circuit case edited out of Mr. Baird's brief, references to "the law of equity," perhaps some other layman's expressions.

We repeat here a statement made in our November 22, 1944, letter to Judge Wilbur, that we imply no criticism of the able lawyers who signed the Lawrence Green brief. They were following the instructions of a client who had too little at stake to justify incurring the expense necessary to present the case adequately. The same situation obtained in the Eighth Circuit.